CASE IN POINT: IMMIGRATION

Sushi restaurant owner convicted of illegally employing foreign workers

Workers without work permits were paid less than others; appeal court overturns conditional discharge for $15,000 fine

| BY SERGIO KARAS |

THE MANITOBA Court of Appeal has levied a substantial fine against a sushi restaurant owner who had received a conditional discharge and probation after pleading guilty to one count of illegal employment of six foreign nationals at his sushi restaurant, contrary to the Immigration and Refugee Protection Act (IRPA). With this decision, the court has sent a strong warning to employers across the country against employing foreign workers without obtaining the appropriate work permits.

The accused, Jung Won Choi, 57, owned a sushi restaurant in Winnipeg. As a result of an investigation conducted by Canada Border Services Agency (CBSA), it was discovered that several South Korean nationals were employed without the appropriate work permits in 2008 and 2009, and were being paid lower wages than other employees of the restaurant. Choi pleaded guilty to one count under the IRPA, which prohibits the employment of a foreign national in a capacity in which she is not authorized to be employed.

At trial, the Crown sought a conviction and substantial fine under the IRPA, which allows a fine of up to $50,000 or imprisonment for up to two years — or both — for such an offence. There is no minimum penalty set out.

Conditional discharge included charitable donations

Despite the Crown's submission, the sentencing judge imposed a conditional discharge for 18 months, which included supervised probation as well as meeting certain conditions — one of which was that Choi must make charitable contributions of $6,000 each to two organizations that assist immigrants. The Crown appealed the sentence.

The Manitoba Court of Appeal had to decide two issues: first, whether the sentence imposed was appropriate and, second, whether the sentencing judge could order Choi to make charitable donations as a condition of the probation order.

The appeal court noted the IRPA creates a regulatory scheme that applies to what is known as the "worker class" — foreign nationals who may work in Canada for a set period of time specified in their work permits before returning to their home country. Through the Temporary Foreign Worker Program, employers are allowed to recruit and employ foreign workers to meet temporary labour shortages after obtaining Labour Market Opinions from the Department of Human Resources and Skills Development Canada (HRSDC), which subsequently entitles a foreign national to apply for a work permit.

The court noted that the CBSA investigation determined several Korean nationals attempted to enter Canada by indicating they were coming to visit Choi and to "help out" in his restaurant, but did not have the appropriate work permits. In one case, the foreign national was apparently compensated with housing and a lump-sum payment on his return to South Korea. The investigation also disclosed that Choi maintained two sets of books in which he distinguished, by way of wages, employees with or without work permits. Lower wages were paid to workers without work permits. In fact, the same individual received a lower wage when working for the accused without a work permit than after obtaining one, although in both cases he was doing the same work. One of the six foreign nationals, who did not have a work permit, never received any payment directly — it went to his mother.

The court noted that while working without work permits, foreign workers have no access to workers compensation benefits, employment insurance or health care. In addition, Choi did not remit income tax or other deductions to the government in respect of employees who did not have work permits.

The Crown asserted that the sentencing judge committed an error in principle by imposing, as part of the conditional discharge sentence, a punitive condition in the probation order — the two charitable contributions. In essence, the condition was inappropriate because the sentencing judge should have imposed a fine instead. The Crown argued the lack of rationale as to why the sentencing judge imposed that punishment while at the same time granting a conditional discharge made the sentence unfit. It also contended that a conditional discharge with probation is unfit given the circumstances of the offence, and the sentencing judge erred by minimizing the importance of the principles of general deterrence and denunciation that would be appropriate in respect to the offence.

The Crown argued that the appropriate sentence would have been a conviction and a fine, as the illegal employment of foreign nationals was wilful and occurred over a period of time. The illegality was a business prac-

Continued on page 5

CASE IN POINT: IMMIGRATION

Probation order cannot be punitive: Appeal court

...continued from page 4

tice of the corporation, as evidenced by its books and records. The Crown sought the imposition of a conviction and a $20,000 fine.

Choi argued the sentence was fit and it was open to the sentencing judge to direct the imposition of a conditional discharge in the circumstances of the case, and to make a probation order and impose conditions. The accused argued that the Manitoba Court of Appeal decision in *R. v. Wisniewski* allowed judicial creativity in sentencing as long as it complied with the sentencing menu of options available in the Criminal Code.

Choi also contended that he was not the mastermind of a scheme to import and hire foreign workers, and some workers arrived in Canada with work permits issued by the Canadian Embassy in Korea, while others entered as visitors and subsequently were issued work permits in Canada. He said he was not involved in the exploitation of workers, and by his guilty plea he acknowledged his wrongdoing. Also, in addition to the probation order requiring charitable donations, he was obligated to complete 50 hours of community service work.

Imposition of donation instead of fine not an option

The appeal court noted there was no dispute that a conditional discharge was open for consideration by the sentencing judge, as the offence had no minimum penalty prescribed and the maximum jail term which could be imposed was two years. The court agreed that the decision in *Wisniewski* allowed for judicial creativity in sentencing. However, the imposition of a condition in a probation order which forms part of a conditional discharge was not a sentencing option available under the Criminal Code. Section 732.1(3) of the code provides for the optional conditions which a court may prescribe in a probation order. Nevertheless, the court noted that the sentencing judge failed to give an appropriate rationale as to how the conditions would protect society and facilitate Choi's successful reintegration into the community.

The appeal court further held that the jurisprudence makes clear the conditions of a probation order may not be punitive and a condition requiring an offender to pay $12,000 is clearly punitive, resulting in the imposition of an unfit sentence.

The court held that the sentencing judge erred in failing to consider the objective of protecting immigrants who may be vulnerable and assist employers who may need workers that can't be found in Canada — while protecting jobs for Canadians — and the balance required to accommodate them within the overall regime.

In addition, the court held that the sentencing judge did not place sufficient emphasis upon the principles of denunciation of Choi and his conduct in the circumstances of his offence, or the need for general deterrence by "sending a clear and appropriate message to other employers as to the consequences of a willful violation of the IRPA in illegally employing foreign workers."

The court found that from the perspective of denunciation, the facts make clear that this breach of the IRPA was not the result of carelessness, mistake or lack of due diligence, but rather it was wilful conduct. In employing people without a work permit, paying them less, depriving them of access to benefits, and avoiding the need to contribute to the government benefits programs, Choi secured for himself a marketplace advantage over similar employers acting legally, said the court.

The court set aside the conditional discharge and probation order and substituted it with a conviction for the offence and a fine for $15,000.

The court commented on its own decision in *R. v. Rivais*, which was cited by the parties during arguments. In that case, the court reversed a sentence which had granted a conditional discharge with a probation order, and had attached a condition that directed the accused to pay the sum of $2,500 in a charitable donation. The decision in *Wisniewski* held that there appears to be no consensus across Canada as to whether the imposition of a charitable donation fosters principles of restorative justice and rehabilitation better than the normal fine payable to the state. The question of whether a charitable donation was an appropriate order was best left to Parliament.

This case sends a strong message to employers that the employment of foreign nationals must be in compliance with the regulatory scheme set out by the IRPA in all cases, and in no case should employers be lax in the requirement for work permits. Failure to follow the legislation can result in disastrous consequences, as it did in this case, where a criminal conviction and substantial fines were imposed despite a guilty plea at trial. CELT

For more information see:

- *R.v.Choi*, 2013 CarswellMan 442 (Man. C.A.).
- *R. v. Wisniewski,* 2002 CarswellMan 296 (Man. C.A.).
- *R. v. Rivais,* (5 January 1981), Winnipeg (Man. C.A.).

ABOUT THE AUTHOR

Sergio R. Karas

Sergio R. Karas is a certified specialist in Canadian Citizenship and Immigration Law by the Law Society of Upper Canada, with Karas Immigration Law in Toronto, and editor of the Global Business Immigration Handbook. *He can be reached at (416) 506-1800 or karas@karas.ca.*